United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7374

UNITED STATES COURT OF APPEAL
SECOND CIRCUIT

VANESSA TAYLOR, on behalf of herself and all other persons similarly situated,

APPELLANTS,

- against -

CONSOLIDATED EDISON CO., of New York, INC.,; CHARLES F. LUCE, individually, and in his capacity as Chairman of CONSOLIDATED EDISON CO. of New York, INC.; ARTHUR HAUSPURG, individually, and in his capacity as President of CONSOLIDATED EDISON CO. of New York, INC.; THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; ALFRED E. KAHN, individually, and in his capacity as Chairman of the Public Service Commission of the State of New York; and EDWARD P. LARKIN, CARMEN CARRINGTON MARR, HAROLD A. JERRY, JR., and EDWARD BERLIN, each individually and in his capacity as Commissioner of the Public Service Commission of the State of New York, CONNIE ROHAN, as agent of the Public Service Commission,

APPELLEES.

B P/S

AN APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS/APPELLANTS

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ATTORNEYS FOR PLAINTIFFS/APPELLANTS

ELOISE BRONSON, on behalf of herself

UNITED STATES COURT OF APPEAL
SECOND CIRCUIT

----------x

VANESSA TAYLOR, on behalf of herself and all other persons similarly situated,

APPELLANTS,

- against -

CONSOLIDATED EDISON CO., of New York, INC.,; CHARLES F. LUCE, individually, and in his capacity as Chairman of CONSOLIDATED EDISON CO. of New York, INC.; ARTHUR HAUSPURG, individually, and in his capacity as President of CONSOLIDATED EDISON CO. of New York, INC.; THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; ALFRED E. KAHN, individually, and in his capacity as Chairman of the Public Service Commission of the State of New York; and EDWARD P. LARKIN, CARMEN CARRINGTON MARR, HAROLD A. JERRY, JR., and EDWARD BERLIN, each individually and in his capacity as Commissioner of the Public Service Commission of the State of New York, CONNIE ROHAN, as agent of the Public Service Commission,

APPELLEES.

----------x

AN APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS/APPELLANTS

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PRELIMINARY STATEMENT

Most of the points raised by defendants in their briefs are amply answered by plaintiffs' main brief on this appeal. This reply brief therefore responds to only the several arguments raised by defendants which require further clarification. Essentially, plaintiffs contend here that on the facts of this case, Con Edison can not succeed in its strained efforts to persuade this Court that this case is other than a case of discontinuance for nonpayment of imposed charges and deposit; and plaintiffs further contend that New York State law and regulations in the area of utility shut-offs clearly create the "color of law" necessary to supply state action in this case.

ARGUMENT

POINT I

THE INVOLVEMENT OF THE STATE IN DEFENDANTS' TERMINATION OF PLAINTIFF'S ELECTRIC SERVICE FOR NONPAYMENT OF CHARGES RENDERED IS SUFFICIENT TO CONSTITUTE STATE ACTION.

Defendants argue that state law and regulations -- and hence state action -- applies only to utility shut-offs for the reason of nonpayment.[1] Con Edison brief at 19 and 29,

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[1] Subsequent to District Judge Tyler's opinion and consent order in Bronson v. Con Edison, 350 F. Supp. 443 (SDNY, 1972), the Public Service Commission promulgated extensive regulations and ordered changes in the Con Edison Tariff to cover this area. The consent order decrees "that before the utility service of a residential customer of Consolidated Edison Company of New York, Inc. may be discontinued for alleged nonpayment of bills or charges such customer must be afforded notice and an opportunity to be heard on disputed issues...." [emphasis added] (See Order annexed hereto.)

PSC brief at 11 and 17. Although plaintiff contends that all utility shut-offs are governed by the Transportation Corporation Law and the PSC regulations, she also contends that even under defendant's more restrictive view, the case before this Court is clearly a case of nonpayment of charges and hence involves state action.

Nowhere in any affidavit or statement upon which the motions for summary judgment or to dismiss herein are based do defendants allege that they discontinued or refused to restore service for the reason of the alleged tampering. Rather the discontinuance was plainly for the sole reason of plaintiff's nonpayment of estimated charges for services and a deposit imposed by Con Edison.

Con Edison's Tariff provides for bills based upon estimated usage of service:

> "In case any meter or measuring device used under an agreement for service for any reason fails to register for any period of time the full usage of service by a customer ...the usage of service by such customer may be estimated by the company on the basis of available data and the customer billed accordingly." Con Edison Tariff (PSC No. 8 - Electricity) General Information III §11(g). (A-33) [Emphasis added]

Con Edison's stated policy in cases of alleged tampering is to disconnect service for the reason that the consumer has failed to make arrangements to pay for unmetered service: "If the customer fails to appear at the District Office or to contact the company to make acceptable

arrangements, the service is discontinued and the customer is notified of the action taken at the time of discontinuance... A telephone number is given for the customer to call to make arrangements to pay for the unmetered service and to restore service." Affidavit of Richard N. Arcari, Director of Central Commercial Services for Con Edison. (A-24-25). In this case the unmetered service was calculated in the amount of $100. Con Edison brief at 4 (A-84). In addition a $100 deposit was assessed. Con Edison brief at 4 (A-84).

In the affidavit of Herbert Warne, Con Edison's Supervisor in Meter Operations for Staten Island, it is stated that in response to a phone call made on behalf of the plaintiff the following information was given:

> "I informed him that, in accordance with our procedure, it would be necessary for him to pay a $100 security deposit and an additional $100 on account until a bill had been computed for the unmetered service. I further informed him that if these payments were not made by the afternoon of the following day (Friday, March 12, 1976) service would be disconnected." (A-37-38).

The Warne affidavit definitively states that "[s]ubsequently, on Monday, March 15th, the service was again terminated since no payment had been made." The Public Service Commission in its own intervention into this case repeatedly told plaintiff to pay the $200 charge and deposit to have her service restored. (A-9&64). As of March 23, 1976 when they requested Con Edison to restore service their staff began to look into the reasonableness of the two $100 charges. PSC brief at 4.

The conclusion is inescapable that the PSC thus involved itself in plaintiff's case because, properly, it viewed the case as involving termination of service for nonpayment. Con Edison can not now be heard to assert for the first time, and in wholly self-serving fashion, that the shut-off was "not for nonpayment of bills rendered for service or for failure to pay a required deposit, and that plaintiff was not entitled to the procedural rights given to customers who are subject to discontinuance of service for nonpayment." Con Edison brief at 45.

It could hardly be clearer that the actions taken herein by both Con Edison and the Public Service Commission fall unquestionably in the areas regulated by State law, PSC regulations, and the PSC ordered sections of Con Edison's Tariff.[2] (See Plaintiff's brief at 6-7, Con Edison's brief at 29).

State action exists in New York for cases of utility shut-offs for nonpayment. Certainly when state action was disclosed below on the uncontradicted affidavits and statements presented to the Court enough was shown to sustain plaintiff's contention that the shut-off herein falls clearly into the nonpayment category and on that basis alone defendant's motions to dismiss should have been denied.

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[2] Con Edison argues that only the Tariff sections regarding the discontinuance of service for nonpayment were added to the Tariff on order of the PSC.

POINT II

NEW YORK STATE LAW AND REGULATIONS IN THE AREA OF UTILITY SHUT-OFFS CREATE THE "COLOR OF LAW" NECESSARY TO CREATE STATE ACTION.

Defendants' argument that Jackson v. Metropolitan Edison Co., 419 US 315 (1975) has effectively closed the door with respect to state action by a utility company in a shut-off case (Con Edison brief at 11, PSC brief at 4) is clearly erroneous in view of subsequent cases completely ignored by defendants in their briefs. Defendants made no attempt to distinguish the instant action from Condosta v. Vermont Electric Cooperative, 400 F. Supp. 358 (D. Vt., 1975) cited by plaintiff's brief, (Plaintiff's brief at 10, 18), which held that allegations of state interference similar to those alleged by plaintiff in the instant case constitute state action.[3]

Furthermore, under the law of the State of New York, the involvement of the state in terminating electric service is sufficient to constitute state action. In Levine v. Long Island Lighting Co., 349 NYS 2d 963 (Sup. Ct., Nassau County, 1973), the court noted that the Long Island Lighting

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[3] More recently, in Dawes v. Philadelphia Gas Comm., ___F.Supp.___ 45 USLW 2225 (D.C. Pa., 10/5/76) the court rejected in an analogous context the argument that termination of gas service was not made under color of state law. In that case the utility was operated by a private corporation while the utility's real and personal property was owned by the city. The court found that under these circumstances, there was sufficient state involvement in the utility's actions so that its termination of service constituted state action.

Company (LILCO) and the Long Island Water Company (LIW), utility companies subject to the same regulations as Con Edison, are subject to full and complete government regulation under the Public Services Law, Transportation Corporations Law and State regulations. Id. at 967. Citing the Third Circuit opinion in Jackson v. Metropolitan Edison Co., 483 F. 2d 754 (3d Cir., 1973) aff'd 419 US 315 (1975), the court held that New York State's intervention into the affairs of the utility is so extensive that the utilities operate as agents of the state and that their termination of service involves state action. Levine v. Long Island Lighting Co., supra. at 967.

To support their argument that there is no state action in the instant case, defendants assert that Con Edison acted solely under their Tariffs and the common law in terminating plaintiff's service. Clearly, since General Rule III, §15 of the Tariff provides that Con Edison may discontinue service only "in such manner as may be permitted by law under the circumstances" (A-34), the Tariff itself gives Con Edison no legal right absent some other legal basis, to enter a customer's premises. Defendants' contention that the common law gives Con Edison such a right is equally erroneous. Plaintiff has demonstrated that the common law of New York has never given a person the right

to enter another's premises to recover his own chattel. (Plaintiff's brief at 12). However, even under defendants' interpretation of the common law, Con Edison still had no right to enter plaintiff's premises. Citing Madden v. Brown, 8 AD 454 (4th Dept., 1896), defendants argue only that it is well settled a person may enter another's premises to recover his own property which was wrongfully taken from him. Con Edison's brief at 18. Even if they are correct in this, that proposition can not legitimize Con Edison's actions in the instant case. Con Edison came onto plaintiff's premises and disconnected the meter; it did not recover the meter nor does it allege that the meter was wrongfully taken by plaintiff.[4]

Further, whether or not Con Edison had a right on the facts of plaintiff's case to disconnect her meter is disputed and is the very question in issue with respect to which due process requires a hearing. Heermance v. Vernoy, 6 Johns. 5 (1810) and Blake v. Jerome, 14 Johns. 406 (1817), which Con Edison attempts to distinguish because they involved disputes as to the ownership of the chattel sought

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[4] Indeed, if Con Edison were to remove the meter, the replevin procedures of New York Civil Practice Law and Rules Article 71 and the procedures outlined in Consolidated Edison Co. of New York v. Powell, 77 Misc. 2d 475, 364 NYS 2d 311 (Civil Court Bronx and New York Counties, 1974) should have been followed, and clearly state action would then exist. Cf. Lapreace v. Raymours Furniture Co., 315 F. Supp. 716 (N.D. N.Y., 1970)(Three-Judge Court).

to be recovered (Con Edison's brief at 17) are therefore particularly pertinent to plaintiff's case. According to defendants, these cases only hold that one has no right to enter premises to recover chattel when title is in dispute. (Con Edison's brief at 17). Even if this restrictive reading of these cases is correct, the cases lend no support to Con Edison's position because here also there is equally a serious dispute as to whether Con Edison had a right to discontinue service. Likewise, Con Edison attempts to distinguish Dobbs v. Northern Union Gas Co., 78 Misc. 136 (Ap. Term, 1st Dept., 1912) and Goblet v. New York Power & Light Corp., 267 AD 1030 (3d Dept., 1944) on the grounds that the defendant utilities there committed tresspass because the customers were not actually in arrears. In the instant case plaintiff also alleges the utility is incorrect and she has committed no wrongdoing, which issue can only be determined after holding a due process hearing which is the object of this suit.

Clearly, Transportation Corporations Law §15 creates the "color of law" under which Con Edison acts in discontinuing electric service. Defendants argue that this statute deals only with entries for the purpose of terminating service for nonpayment of bills and that since this is not a nonpayment case, §15 is inapplicable. However, the portions of §15 dealing with the utility's right to enter premises clearly apply to all terminations of service. It is only the last

sentence of paragraph (1) of §15, added by amendment in 1937, New York Laws of 1937, Ch. 545, which restricts the statutory right to a five-day notice to disconnection for "non-payment of bills rendered" instead of "for any cause."[5]

Finally, it is crucial that acting pursuant to the state's extensive regulations, the Public Service Commission has taken action in this case. (PSC brief at 4). The PSC in requesting interim action and in its investigation of the claim, has involved the state. PSC's argument that it is only investigating part but not all of the claim (PSC brief at 4) and that therefore there is no state action is wholly unpersuasive.

CONCLUSION

For the reasons set forth above and in plaintiff's main brief, the District Court's order granting defendants' motions to dismiss should be reversed, and this court should remand the case back to District Court with instructions that the District Court certify the plaintiff class, and enter summary judgment and grant permanent injunction for the plaintiffs.

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[5] Likewise regulations found at 18 NYCRR Part 143 deal in part with nonpayment (§§143.1 and 143.3) and in part are not restricted. (§143.2).

RESPECTFULLY SUBMITTED,

KALMAN FINKEL
Attorney-in-Charge
The Legal Aid Society
Civil Division

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DAVID GOLDFARB,
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ATTORNEYS FOR APPELLANTS

- x

ELOISE BRONSON, on behalf of herself and all other persons similarly situated,

Plaintiffs,

- against -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, JOSEPH C. SWIDLER, individually and in his capacity as Chairman of the Public Service Commission of the State of New York and Chairman of the Department of Public Service, and WILLIAM K. JONES, EDWARD P. LARKIN and CARMEL CARRINGTON MARR, each individually and in his capacity as Commissioner of the Public Service Commission of the State of New York,

Defendants.

- x

Civil Action No.

72 Civ. 3087 HRT

FINAL CONSENT ORDER, JUDGMENT AND DECREE

WHEREAS, a complaint having been made by the plaintiff against the defendants for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983; and

WHEREAS the Court, on October 30, 1972 having denied the defendant Consolidated Edison's motion to dismiss the complaint and the plaintiff's cross-motion for summary judgment; and

WHEREAS, the New York State Public Service Commission and its members having been joined as defendants herein by amended complaint served and filed December 29, 1972; and

WHEREAS, the parties, on February 21, 1973, having entered into a Stipulation, and in Interim Order on Consent disposing of several of the issues raised in the action having been entered thereon; and

WHEREAS, the defendant Public Service Commission on May 9, 1973, having adopted regulations governing its own complaint and hearing procedures and those of the utility companies within its jurisdiction which relate to the subject matter of this litigation; and

WHEREAS, counsel for the parties having agreed on the substance and terms of the accompanying memorandum of the Court dated May 23, 1974, and having agreed to the entry of a final judgment disposing of the remaining issues and to be bound thereby; it is

ORDERED ADJUDGED AND DECREED, that before the utility service of a residential customer of Consolidated Edison Company of New York, Inc. may be discontinued for alleged nonpayment of bills or charges such customer must be afforded notice and an opportunity to be heard on disputed issues in a manner not inconsistent with the opinion of this Court herein dated October 30, 1972 and the memorandum of the Court dated May 13th, 1974.

~~SO ORDERED~~

Dated: New York, New York
May 23, 1974

H. R. Tyler, J.
District Judge

ADDENDUM
--page 2

CONSENTED TO:

Michael D. Hampden
Attorney for Plaintiff

(Consented to:

Michael D. Hampden
Attorney for Plaintiff

Jeff Schechter
Atty for Public Defender Commission

William J. O'Neill
Attorney for Con Edison

C 375—Affidavit of Personal Service of Papers on Individual.

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 EXCHANGE PLACE AT BROADWAY, NEW YORK

UNITED STATES COURT OF APPEAL
SECOND CIRCUIT

VANESSA TAYLOR, et al.,

APPELLANTS /Plaintiff

against

CONSOLIDATED EDISON CO., of NEW YORK, INC., et al.,

APPELLEES /Defendant

76 - 7374

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF RICHMOND ss.:

MARSHALL GREEN, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at STATEN ISLAND, NEW YORK.

That on the 23rd day of NOVEMBER 19 76 at 4 IRVING PLACE, N.Y., N.Y. and 2 WORLD TRADE CENTER, N.Y., N.Y.

deponent served the annexed REPLY BRIEF FOR PLAINTIFFS/APPELLANTS upon WILLIAMS & O'NEIL, ESQS., ATTORNEYS FOR CON EDISON, their officers and agents and PETER SCHIFF, ESQ., ATTORNEY FOR P.S.C., their officers and agents

the DEFENDANTS' ATTORNEYS in this action by delivering a true copy thereof to their agents personally. Deponent knew the person so served to be the person mentioned and described in said papers as the agents for defendants' attorneys herein.

Sworn to before me, this 24th day of NOVEMBER 19 76

DAVID GOLDFARB
Notary Public, State of New York
No. 43-[illegible]
Qualified in Richmond County
Commission Expires March 30, 1978

Marshall Green

Print name beneath signature

MARSHALL GREEN

SECRETARY

Nov 23 2 04 PM '76

C E. C[illegible] N. Y. INC.